

INVESTIGATIVE MEASURES IN PREJUDICIAL INQUIRY: THE CONCEPT, CONTENT AND THE BASICS OF LAW ENFORCEMENT

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Abstract: This article discusses the problems of introduction of new institutions in the criminal procedure legislation of the Republic of Kazakhstan. One of them is investigative measures (actions). Attention is paid to the lack of their legal regulation in laws that can lead to the violation of the rights and freedoms of the individual. The analysis of the internal content of this procedural institute is performed. The comparison with similar provisions of a number of countries is made. On this basis, some suggestions are made on the algorithmization of investigative measures (actions).

Keywords: Investigative measures (actions), special investigation activities, the Criminal procedure code, investigation, covert surveillance.

INTRODUCTION

The Concept of the Legal Policy of the Republic of Kazakhstan for the period from 2010 to 2020 provides for the development of optimal legal mechanisms for the effective application of criminal-procedural legislation and legislation on special investigation activities, for the rapid and full disclosure of crimes, exposure and bringing to justice of those who committed them, a fair trial and a proper application of the criminal law (On the Concept of Legal Policy of the Republic of Kazakhstan for the Period from 2010 to 2020).

At that, the main goal of criminal proceedings is the protection of individual rights. In the modern theory of civil rights, the concept of privacy or freedom from unreasonable invasion in the citizen's activity within the scope of the personal autonomy is highlighted (Joseph, et. al., 2005).

In the countries of the English legal family, where the concept of privacy comes from, there are three different aspects or areas of it:

- the territorial aspect refers to a specific place, e.g. the dwelling of a person;
- personal or physical aspect, which affects the interests in terms of the human body (the body shape of a person, his/her voice or name);
- informational aspect, which affects such issues as health status, sexual orientation and life, social views, friendship and other social relationships (Power 2013).

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For example, in Germany these rights and freedoms in the course of an investigation are protected by a specialized judge – Ermittlungsrichter (preliminary investigation judge). He/she has broad powers; in particular, he/she decides on the custody or temporary placement in a psychiatric hospital; temporary driver license suspension; authorizes search and seizure; authorizes the phone listening to the suspect; performs logging of testimony. The judge is not involved in the decision of cases of first instance or examining the merits. He/she checks the validity of the activity of the police and prosecutors, but doesn't lead the preliminary investigation (Kovalev 2007).

Usually, the police can not address the preliminary investigation judge, except in urgent cases. The police must first contact the appropriate prosecutor with a request to submit a petition to the court (Cape, et. al., 2007).

So, in Italy, the wiretapping can be authorized by the preliminary investigation judge if there are serious grounds to believe that the offense was committed or is being committed, and only if this investigating action is absolutely necessary to continue the investigation (Bradley 2007).

In Germany, the wiretapping is possible under the following conditions:

1. A based on facts suspicion that the person has committed or intends to commit one of the crimes specifically mentioned in Article 100A of the Criminal Procedure Code of Germany. This list includes serious crimes ranging from murder and treason to arson, extortion, and crimes related to illegal drug trafficking and money laundering.
2. The investigation of a crime by other investigative actions and practices will be impossible or extremely difficult;
3. The decision to conduct this investigative action is taken by the preliminary investigation judge (*Criminal Procedure Code of Germany. Art. 100a, 1987*).

Thus, it is obvious that in foreign countries there is a detailed legal regulation of covert activities of law enforcement agencies in the course of prejudicial inquiry.

METHODS

The methodological background of the article is composed of: the dialectical method of cognition of socio-legal phenomena, as well as systemic-structural, comparative legal, logical-theoretical and specific scientific methods of study. In addition, the study used such sociological techniques as surveys of law enforcement agencies and the study of specific criminal cases. To achieve the objectivity of research results, these methods were applied comprehensively.

RESULTS

In 2014, a new Criminal Procedure Code of the Republic of Kazakhstan was adopted, which, along with the secret investigative actions included investigative measures

(activities). Thus, Article 7 of the Code explains this concept: “56) investigative measures (activities) are actions of investigative agency carried out by the order of an agency conducting the criminal proceedings, aimed at establishing the location of persons, hiding from the agency conducting the criminal process, and (or) evading from criminal liability, obscure missing persons, objects and documents relevant to the case, and at identification of persons committed a criminal offense.” Thus, the law defined the investigative measures (along with the secret investigative actions) as an institution designed to provide objective, impartial, prompt and complete disclosure of criminal offences (Article 8 of the Code) (The Criminal Procedure Code of the Republic of Kazakhstan (New), 2015).

A detailed study of the concept of investigative measures reveals five main areas of their application:

- search for persons, hiding from the agency conducting the criminal process, in the course of prejudicial inquiry;
- search for persons evading from criminal responsibility, after the verdict of the court;
- locating missing persons;
- establishing evidence in criminal cases;
- establishing suspects in unsolved crimes.

However, despite the novelty of this institution, so far it is unfairly overlooked by the attention of experts in the sphere of criminal process, and special investigation activities. Especially many questions arise when studying the procedure of initiating and receiving the results of investigative measures.

An analysis of the views of a number of scientists shows that almost all of them do not make the difference between investigative measures and special investigation activities. This is due to the fact that Kazakhstan is one of the few countries where investigative measures are present in the legislation as a purely criminal procedure institute. In Russia and Belarus, for example, investigative measures form a part of the operational-investigative measures and relate primarily to the field of special investigation activities (Goryainov, et. al., 2006; Basetsky 1993).

In the legislation of Kazakhstan, an interesting concept was developed, according to which special investigation activities and criminal proceedings have their own institutions, virtually mirroring each other. This is achieved by amending Article 11 of the Law of the Republic of Kazakhstan “On Special Investigation Activities” with the additional paragraph 4, according to which the operational-investigative measures after the beginning of prejudicial inquiry can be transformed into investigative measures:

1. survey of persons;
2. establishment of open and secret relations with citizens, using them in special investigation activities;

3. creation of secret enterprises and organizations;
4. the use of technical means for obtaining information, without affecting the legally protected privacy of home, personal and family secrets, and the confidentiality of personal deposits and savings, correspondence, telephone conversations, postal, telegraph and other messages;
5. inquiries;
6. obtaining samples;
7. the use of sniffer dogs;
8. search and identification of individual signs;
9. search for devices of illegal recording of information;
10. detection, secret fixing and withdrawal of traces of illegal acts, their preliminary examination;
11. the prosecution of persons, preparing, committing or having committed a crime, his/her detention;
12. implementation at the presence of witnesses of personal search of detainees, seizure of belongings and documents that may relate to criminal activities, and inspection of residential premises, work or other places, inspection of vehicles.

In the implementation of anti-terrorist operation, the personal examination and inspection of things, held by a natural person, inspection of vehicles, including with the use of technical means, can be produced without the participation of witnesses;

13. conduct of operations of capture of armed criminals (The Law of the Republic of Kazakhstan No. 233-ZRK “On Introducing Amendments and Additions to Some Legislative Acts of the Republic of Kazakhstan on Issues of Improvement of Criminal Procedural Legislation”, 2014).

However, the provisions of the new Criminal Procedure Code do not regulate the order of preparation, conduct and utilization of the results of investigative measures, as it is established in the case of secret investigative actions. For example, the details of giving by the investigator (the junior detective) of instructions on conduct the investigative measures are not reflected. Moreover, a number of provisions provide the right to the inquiry agency (operational unit) to determine the order of its conduct by itself.

The law requires the compliance with only one condition – the availability of the corresponding order of the investigator as grounds for the investigation. So, Item 1) of Part 1 of Article 61 of the Code says that the inquiry agencies, depending on the nature of the criminal offence, decide on the adoption of criminal procedure and investigative measures in accordance with the competence, established by law, required in order to detect signs of criminal offenses and persons who committed

them, prevention and suppression of criminal offences. In addition to this, Part 3 of Article 196 of the Code states: “3. After the transfer of the case to the investigator, the inquiry agency may perform the investigation, covert surveillance and search actions only on the order of the investigator. In the case of a transfer to the investigator of the case, where it was not possible to detect the person committed a criminal offence, the inquiry agency is obliged to take investigative measures to establish the person committed a criminal offence, with the notification of the investigator regarding the results.” (The Criminal Procedure Code of the Republic of Kazakhstan (New), 2015).

No further steps of the investigator (the junior detective) and the inquiry agency on this order are specified in the law. Given the above, in practice varying interpretations of the order of investigation measures may occur, which is fraught with violations of human rights and freedoms during the pre-trial proceedings.

In this regard, it is necessary to identify the conceptual basis for their implementation. First of all, it seems appropriate to establish for investigation the same procedure that existed before – at the performance of individual assignments on implementation of operative-investigative measures. Immediately after the adoption of the case for investigation, if criminal offence is not disclosed, the investigator (junior detective) shall have the right to instruct the operative unit to conduct the investigation. The instructions may contain either separate events from the above list or their complex. It is also possible, when the order does not specify the investigative measures, but simply references them. In this case, the operational unit chooses which measure and when it will be required.

This corresponds to the order which exists for the purpose of secret investigative actions. Thus, according to the Item 8 of Paragraph 8 of the interagency Rules of Performing the Secret Investigative Actions, the operational unit independently determines the order of execution of their several types and is responsible for the validity of these decisions and the legality of their conduct (The Joint Order of the Minister of Finance of the Republic of Kazakhstan dated December 12, 2014, No. 565).

The law does not establish specific requirements for the form and procedure for providing the results of investigative measures to the investigator (junior detective). In our opinion, it allows the operational unit to determine the amount of material to be transferred.

As for the form of provision of the results of investigative measures to the investigator, we believe that it is possible to act within the provisions of Article 184 of the Criminal Procedure Code of the Republic of Kazakhstan “The report on the discovery of a criminal offense”. According to this provision, if the inquiry agency’s employee finds traces or consequences of a criminal offense, he/she prepares an appropriate report with the application of present materials and documents. It should be kept in mind that the deadline for the execution of the instructions on carrying out

the investigative measures is limited to ten days (Part 3 of Article 188 of the Code) (The Criminal Procedure Code of the Republic of Kazakhstan (New), 2015).

If within the specified period in the implementation of the investigative measures the concrete results were not achieved, the investigator is given an interim response on this, and the measures continue to perform. The period of the investigative measures may be limited in the following cases:

1. if a criminal case is closed under any circumstances;
2. if a case is closed and sent to the prosecutor for transfer to the court;
3. if there is no more need for investigative measures.

In any event, the investigator shall send to the operational unit an instruction of the termination of the investigation.

DISCUSSION

The lack of resolution of many aspects of secret law enforcement in the laws, in practice, can produce significant violations of the rights and freedoms of the individual. The legality and validity of such state intervention in the rights and freedoms of citizens should be determined by the court.

This also concerns those cases that are not urgent. The foreign literature describes the possibility of issuing an order by telephone or other means of communication: the order may be issued at a distance, when a judge is not close to the police officer who needs to obtain an order; the police officer does not need to immediately appear in court; the order can be issued relatively quickly (Fontana & Keeshan 2010).

In some Western countries, such as Denmark, law enforcement agencies, based on a court decision, can use some forms of “traps” and “baits”. In particular, the Civil Code and Criminal Procedure Code of Denmark contain the following special rules. The police in the investigation cannot propose a particular person to commit a crime, except in cases when three mandatory conditions are observed: (1) there is a reasonable suspicion that a crime is being committed or will be committed; (2) other methods of investigation are not sufficient; and (3) the committed crime is punishable by more than six years of imprisonment. In addition, the law requires that the decision on conduct of such investigative actions must be authorized by the court (Slobogin 2012).

With regard to the legislation of Kazakhstan, now courts do not have the ability to influence covert surveillance of law enforcement agencies, which is one of the important issues that require resolution.

CONCLUSION

Investigative measures in the new Criminal Procedure Code of the Republic of Kazakhstan (as well as covert surveillance) in its inner content are the same special

investigation activities that already existed and exist in the operational-investigative law. The only difference is in their number and the slightly changed name.

This circumstance leads to a relatively smooth transition of law enforcement practice to work in the conditions of new legislation.

To make this transition less problematic, it seems appropriate to consolidate the above procedure for the performance of investigative measures in the departmental normative legal acts regulating the interaction of operational units with the investigators (junior detective). This will allow to unify the existing practice and to minimize the possibility of violations of the rights and freedoms of the individual.

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